No. 7003

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CLARENCE W. MORRIS,

Appellant,

vs.

HARRY L. HUSSMAN and CAROLINE HUSSMAN,

Appellees.

BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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May it Please the Court:

This is an appeal from the judgment entered on the pleadings and statement of facts that would be proved.

A brief summary of the facts follows:

1. Appellees were the owners of certain real property in the City and County of San Francisco, State of California.

2. Appellees entered into a lease of said real property with Chester A. Morris, which lease provided that certain improvements were to be made upon the leased premises.

3. Appellees did not file notice of non-responsibility to be relieved from paying for the contemplated improvements.

4. Lessee contracted with Barrett & Hilp for improvements on appellees' real property.

5. Appellant became a surety to Barrett & Hilp on the contract of lessee.

6. The contract was completed by Barrett & Hilp and improvements made to the extent of $5641.84; $1250.00 was paid on account thereof, leaving a balance of $4391.84.

7. Barrett & Hilp filed a mechanic's lien against appellees' property for this balance.

8. Barrett & Hilp thereafter and on March 1, 1931, assigned to Credit Clearance Bureau their mechanic's lien and all claims due under said contract, said assignment being in the following language:

> **For value received, the undersigned does hereby sell, assign, transfer and set over unto Credit Clearance Bureau, all of its rights, title and interest in and to the within lien and claim of lien.**
>
> **Dated, March 1, 1931.**
>
> **Barrett & Hilp,**
> **By J. F. Barrett.**
>
> (Endorsed): F40746. (Tr. p. 4.)

9. Thereafter and on March 17, 1931, said Credit Clearance Bureau filed suit in the Superior Court of the State of California, in and for the City and County of San Francisco, against appellees to foreclose said lien upon appellees' real property.

10. Thereafter and on April 13, 1931, said Credit Clearance Bureau dismissed said action, the amount sued for having been paid in full.

11. On the same day, i. e., April 13, 1931, Barrett & Hilp purported to again assign, this time to appellees, their right, title and interest in and to the contract between themselves and Chester A. Morris, on which contract appellant was surety; said assignment including the right of Barrett & Hilp to recover on said contract against either Chester A. Morris or appellant, said assignment being as follows:

> **For and in consideration of the sum of $4391.84, receipt of which is hereby acknowledged, we hereby sell, assign, and transfer all of our right, title and interest in and to the within contract unto Harry L. Hussman and Caroline Hussman together with the right to recover against either Chester A. Morris, and or Clarence W. Morris.**
>
> **Dated, April 13, 1931.**
>
> **Barrett & Hilp,**
> **By J. F. Barrett.**
>
> Witness:
> Paul F. Fratessa. (Tr. p. 42.)

These facts appear from the pleadings and agreed statement and do not entitle appellees to relief against appellant for the following reasons:

FIRST.

THERE IS NO CAUSE OF ACTION IN APPELLEES.

The demurrer to the complaint should have been sustained because the assignments hereinbefore set forth show conclusively that Barrett & Hilp assigned any and all rights which they possessed to the Credit Clearance Bureau and, of course, the Credit

Clearance Bureau then became the owner of any rights that existed. The second assignment made does not come from the Credit Clearance Bureau at all, but is a second assignment made by Barrett and Hilp, made at a time they had absolutely no color or claim or title therein and made when they had nothing to assign.

The law under such facts is well settled; we merely cite the language in the decisions:

> "It is not sufficient that the complaint states facts showing a cause of action in somebody; it must show a cause of action in the plaintiff, or a general demurrer will lie. * * * Therefore, neither the complaint, nor the facts found, support the judgment, and it must be reversed."
>
> *Dixon v. Cardozo,* 106 Cal. 507-8.

> "Appellee seeks to avoid the catastrophe by taking the position that it is simply a question of a defect of parties defendant (Bozarth being the sole defendant) which is waived by failure to present it specially as a cause of demurrer. This contention cannot be sustained.
>
> A demurrer for want of facts * * * calls in question not only whether or not a cause of action is stated against the defendant in favor of someone, *but also whether any cause of action is stated in favor of the plaintiff which she is entitled to sue upon and enforce.*
>
> Louisville, etc. R. R. Co. v. Lohges, 6 Ind. App. 288;
>
> Torriss v. Jones, 112 Ind. 498;
>
> Board, etc. v. Kimberlin, 108 Ind. 449;

Frazer v. State, for use, 106 Ind. 471;
Walker, Administrator v. Keller, 104 Ind. 327;
Pence v. Augheguard, 101 Ind. 317;
Bond v. Armstrong, 88 Ind. 65.

The allegations of this complaint leave whatever cause of action does exist upon the facts pleaded in the firm of Mallett and Brownsell, and not in the plaintiff, and is therefore bad. Holman v. Lungtree, 44 Ind. 349; Green v. Louthain, 49 Ind. 139; Richardson v. Snyder, 72 Ind. 425: Derry v. Morrison, 8 Ind. App. 50."

Bozarth v. Millett, 11 Ind. App. 417.

See also, to the same effect:

Buffalo Catholic Institution v. Bitter, 87 N. Y. 250;

Royer v. Clark, 7 Barb. 581 (New York);

Weichsel v. Spear, 47 N. Y. Superior Ct. 223 (15 Jones & S.);

Ralli v. Equitable Mut. Fire Ins. Co., 38 N. Y. Sup. 87;

Leon v. Kerrison, 47 Fla. 178 (36 So. 173);

Harris v. Campbell, 4 Dana, 34 Ky. 568;

Sighers v. Lemaitie, 3 La. Am. 263 (1 Rob. 470);

State v. Dodson, 63 Mo. 451;

Farner v. McCullough, 48 Mo. 318;

Hiclkin v. Nevada City Bank, 8 Nev. 463 (1 N. W. 135);

Klamath Falls Water Users Assn. v. Martin, 178 Pac. 357 (Ore.);

Burton v. Anderson, 1 Tex. 93;

SECOND.

APPELLANT WAS EXONERATED AS SURETY BY THE RELEASE OF THE LIEN BY APPELLEES' ASSIGNOR.

Sureties are favored under the law. This is so because they receive no possible benefit and are penalized for the failure of somebody else to do an act they are bound to perform; therefore, the courts have universally held that when the assured performs an act which in itself deprives the surety of a right he would inherit as said surety, that the assured and not the surety must accept the full responsibility therefor and suffer any loss resulting therefrom.

> "A surety is entitled to the benefit of *every security for the performance of the principal obligation held by the creditor,* or by a co-surety at the time of entering into a contract of suretyship, or acquired by him afterwards, whether the surety was aware of the security or not."
>
> Sec. 2849, *Civil Code of California.*

> "A surety on a note, on payment of the note, becomes the equitable assignee and is entitled to enforce its payment according to its tenor and effect as holder thereof as well as to foreclose the mortgage that was collateral security."
>
> *Waldrip v. Black,* 74 Cal. 709.

By the terms of the agreement under which they seek to hold appellant, he was to protect Barrett & Hilp alone and they have been paid in full.

> "A surety cannot be held beyond the express terms of his contract."
>
> *Civil Code of California,* Sec. 2836.

Anything that could benefit the surety should have been tendered him by the assured. We quote:

> "The contract of suretyship imports entire good faith and confidence between the parties as to the whole transaction. The creditor is bound to observe good faith with the surety. He must withhold nothing, conceal nothing, release nothing which will possibly benefit the surety. He must not do any act injurious to the surety or inconsistent with his rights. He must not omit to do any act required by the surety which duty enjoins him to do, if such omission injures the surety. The liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound and no further. He has a right to stand on its very terms. (1 Story's Equity Jurisprudence, secs. 324-325; Tally v. Parsons, 131 Cal. 518; Carter v. Mulrein, 82 Cal. 169). A surety is exonerated in like manner with a guarantor." (Civil Code, sec. 2840.) "A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or right of the creditor against the principal, in respect thereto, in any way impaired or suspended." (Civ. Code, sec. 2819.)
>
> *County of Glenn v. Jones,* 146 Cal. 518 at 520.

We quote from a case where a lien on real property was released as in the present case.

> "Sayre, then being a surety he was exonerated: (1) if appellant, Montgomery, released Chap-

man from any rights under said judgment, and thus releases the surety; or (2) if Montgomery having a judgment lien upon land of Chapman, which, if sold at its real value, would have released a sufficient amount of money to satisfy all indebtedness of the latter to the former, including said judgment, united with Chapman in selling and conveying said land at private sale to one Hughes at a price far less than its real value."

Montgomery v. Sayre, 100 Cal. 182-185.

We quote from a similar case where the court said:

"Mrs. Kerskner would have been fully protected by the court if she was only a surety (1) of Mrs. Ludlow's interest in the property (C. C. Sec. 2850) besides when she executed the mortgage to secure the note she was charged with the knowledge of the code provision under discussion, the surety is exonerated when without his consent *'the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended."*

Commercial Bank v. Kerskner, 120 Cal. 495 at 500 and 501.

We again quote from a California case:

"It is a well established principle of law that the surety is favored in law and that any act injurious to his rights will operate as an exoneration under his contract."

Bateman Bros. v. Mapel, 145 Cal. 241.

"A creditor or obligee, who has securities or funds in his possession applicable to the payment

of the secured debt, is under the obligation to the surety to use ordinary care and prudence to preserve such securities or funds for the surety's benefit, *and the surety is discharged from further liability either entirely or pro tanto if the creditor, in dereliction of his duty, relinquishes or loses them by his willful acts or through his negligence, or if he consents to a material alteration of the security to the prejudice of the surety, or by any act deprives the surety of the right of subrogation. Relinquishment operates as a discharge of the surety without regard to the existence of collusion or time when the creditor received the security held by him, or whether the surety has knowledge thereof, or whether the principal lacked capacity to enter into the contract.*"

50 *C. J.*, page 159.

"Where a railroad surrendered its carrier's lien for transportation of building material by delivery of the material without payment of freight, it could not enforce its claim for unpaid freight against the contractor's surety, since, if it had not surrendered its lien, the surety could have had the benefit of subrogation."

Kansas City v. Southern Surety Co., 203 Mo. A. 148;

Kingrey on Suretyship and Guaranty (Second Edition) 157.

"Hence if the creditor has taken a lien on property for the debts, or has taken the property of the principal for the benefit of himself and surety, and then releases the lien or gives up the property without the consent of the surety, the

surety is discharged to the extent of such lien or property."

28 *C. J.*, p. 1018.

The case of *Kansas City v. Southern Surety Co.*, 203 Mo. A. 148, is directly in point and there is no distinction that the writers of this brief can conceive between the present case and that case; in that case the railroad surrendered the property on which it had a carrier's lien for transportation charges, and then sought to hold the surety. The Supreme Court of Missouri held that if they had deprived the surety of the benefit of this carrier's lien by surrendering the property, they could not hold the surety, because he could not then be subrogated to the rights of the railroad company held under the carrier's lien. The following California cases sustain this position:

Braun v. Crew, 183 Cal. 728;
Dunne Investment Co. v. Empire State Surety Co., 27 Cal. App. 208, 223;
Woodward v. Brown, 119 Cal. 283;
Siegel v. Hechler, 181 Cal. 187;
Trimlett v. Lynch, 45 Cal. App. 42.

THIRD.

THE SURETY IN THIS CASE IS EXONERATED BY THE SURRENDER WITHOUT HIS KNOWLEDGE OR CONSENT.

The action of the assured through whom it is sought to hold the surety in this case precluded the surety from protecting himself and, of course, deprived the surety of the right to the lien. Where the assured

does anything which affects the right of surety to protect himself, he thereby releases the surety.

We must bear in mind that the only persons appellant agreed to protect were Barrett & Hilp and that Barrett & Hilp, without the knowledge or consent of the surety, collected all the money due them and released the lien on the real property. Had they not sold the lien, they would have been paid in full upon the foreclosure thereof.

FOURTH.

APPELLEES HAVE BEEN GUILTY OF LACHES.

Appellees should have given notice of non-responsibility in accordance with section 1192, Code of Civil Procedure. The surety in this case should not be penalized because the assured, without the knowledge of appellant, surrenders the security to appellees.

If the lien had not been surrendered, one of two things would have happened (a) the lien would have satisfied the obligation or (b) the surety would have been entitled to the security given by said lien, in neither of which events could it be said that the owner of the property, the appellees herein, would be entitled to the property and its improvements at no cost to himself. Surely the appellee is not entitled to eat his cake and have it too, and yet by dealing with Barrett & Hilp without the surety's knowledge, they seek to clear the property of all claim of lien, and then collect everything it has cost them from the surety of Barrett & Hilp.

The surrender of the lien by Barrett & Hilp works an irreparable hardship on the surety, appellant herein, who is thus left without the right of subrogation.

Of course, as the surety would be subrogated to the rights of Barrett & Hilp, he should either have those rights or be exonerated from liability.

If Barrett & Hilp instead of assigning their claim, had foreclosed their lien, no one will contend that the surety, appellant herein, could then have been required to pay the owners of the property, appellees herein, anything, nevertheless, if the judgment of the lower court is permitted to stand, that is exactly what will happen in the instant case.

There was no privity of contract between appellant and appellees, and appellant certainly had not guaranteed to hold appellees harmless, or to release appellees' property from the statutory lien thereon.

We respectfully submit that appellant's position is correct and that judgment of the lower court should not stand.

Dated, San Francisco,
May 10, 1933.

Respectfully submitted,
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